APPENDIX A

Order of Supreme Court of New Jersey Denying Petition for Certification

(Filed—April 18, 1967)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is thereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 18th day of April, 1967.

A True Copy —

JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—February 20, 1967)

LEWIS, J. A. D.

This is a condemnation matter in which defendants Thomas F. Buck and Mary P. Buck appeal from a judgment of the Law Division in favor of plaintiff State of New Jersey appointing commissioners to appraise the value of land proposed to be taken in condemnation by the State Highway Commissioner.

By its complaint the State sought to condemn defendants' property, consisting of approximately five acres, for use by the State Highway Commissioner in the construction of a freeway known as Interstate Highway 287. Their land is designated on various engineering exhibits as "Parcels 30A and 30B." The major part of 30A lies in the path of the proposed freeway; defendants do not contest the right of the State to condemn that portion of their land. They do, however, dispute the authority of the State to take Parcel 30B abutting on the south and a small borderline strip along 30A, totaling approximately 80 feet in width (frontage) by 574.13 feet in depth and consisting of 1.078 acres. The property is in an AAA residential zone, and it was stipulated that the applicable local zoning regulations require a minimum lot size of 3 acres and a 100 foot frontage.

To the southwest of the Buck property are lands of Robert and Dorothy Sheldrick, the northwesterly part of which will be required for the right-of-way of Route 287, leaving 5.3 acres to the southeast. The State proposes to retain

title to Parcel 30B in public ownership and to make it available for access to that remainder portion of the Sheldrick lands which otherwise would be landlocked.

Defendants argue: (1) the Commissioner in the instant matter has abused his discretion or has been guilty of fraud or bad faith in the exercise thereof; and (2) he is attempting to take private property for private use. Plaintiff does not challenge the premise, which is recognized as a basic principle of the law of eminent domain, that the State may under no circumstances take private property for private use.

The trial judge, after a summary hearing on the question of whether the Commissioner had exceeded his powers, *Bergen County* v. *Hackensack*, 39 N. J. 377 (1963), found from the evidence that the value of Parcels 30A and 30B would be $46,000 while the value of 30A alone would be $45,000, and that when the Commissioner, in his discretion, sought to acquire the entire Buck tract he was acting in the best interests of the general public. He held that therefore the State's evidence met the statutory test provided in N.J.S.A. 27:7A-4.1, *viz.*:

> "In connection with the acquisition of property or property rights for any freeway or parkway or portion thereof, the State Highway Commissioner may, in his discretion, acquire by gift, devise, purchase or condemnation, an entire lot, block or tract of land, if, by so doing, the interests of the public will be best served even though said entire lot, block or tract is not needed for the right-of-way proper but only if the portion outside the normal right-of-way * * * is so situated that the cost of acquisition to the State will be practically equivalent to the total value of the whole parcel of land; * * * *."

Appendix B

The proofs amply support the findings of the trial judge and his conclusion. As he pointed out, when the State condemns all of a tract except a portion too small to comply with the zoning ordinance, the State must pay not only for what it takes but also for the damage to the remainder. Therefore when, as here, the value of the whole is little more than the value of the major part, it is sound business judgment and in the public interest to take the entire parcel. This avoids the expense of litigating the damage to the remainder and the hazards of a large award for such damage. We hold that here there was such a taking, and that here these considerations alone satisfied the requirements of N.J.S.A. 27:7A-4.1. In addition, we think the Commissioner, within the confines of said statute, may incidentally seek to avoid creating or leaving a landlocked parcel or parcels that do not comply with local zoning requirements. Rather than leave a land segment useless under local zoning and subject the State to payment of damages incident to unacquired remainder land, the Commissioner made a sound and sensible decision to condemn the entire tract at a practically equivalent cost, especially when in so doing he preserved accessibility to adjoining lands which have an apparent potential for development.

The fact that Sheldricks' private interests may be subserved will not defeat a condemnation proceeding; the controlling question is whether the paramount reason for taking land to which objection is made is in the public interest. Note, *Weaver* v. *Pennsylvania-Ohio Power & Light Co.*, 10 F. 2d 759, 762 (6 Cir. 1926). *Cf. Wilson* v. *Long Branch*, 27 N. J. 360, 376, *certiorari* denied 358 U. S. 873, 79 S. Ct. 113, 3 L. Ed. 2d 104 (1958); *United States* v. *Agee*, 322 F. 2d 139 (6 Cir. 1963). See generally Annotation, "Eminent Domain—Public and Private Purpose," 53 A. L. R. 9 (1928).

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A use is not denominated public or private by simply relying upon the number of persons it serves. See *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 726-728 (Ch. 1832), cited with approval in *Texas Pipe Line Co.* v. *Snelbaker*, 30 N. J. Super. 171, 176-178 (Law Div.), affirmed 33 N. J. Super. 11 (App. Div. 1954); *Essex County* v. *Hindenlang*, 35 N. J. Super. 479, 488-491 (App. Div. 1955), appeal dismissed 24 N. J. 517 (1957); *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 706-707, 43 S. Ct. 689 L. Ed. 1186, 1192 (1923); 2 *Nichols, Eminent Domain* (revised 3d ed. 1963), §7.512(1), pp. 705-706; 5A *Thompson, Real Property* (1957 replacement), §2577, pp. 658-660. It has been stated that a use does not "fail to be public upon the ground that the immediate enjoyment of it is limited to a small group or even to a single person." *United States* v. *Boyle*, 52 F. Supp. 906, 908 (N. D. Ohio 1943), affirmed *sub nom.; Cleveland* v. *United States*, 323 U. S. 329, 65 S. Ct. 280, 89 L. Ed. 274 (1945). Accord, *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 161-162, 17 S. Ct. 56, 41 L. Ed. 369, 389-390 (1896).

In condemnation proceedings an administrative agent, operating under legislative mandate, has broad discretion in determining the quantity of land to be taken, its location and the time of taking; the judiciary will interfere only in a plain case of abuse of that discretion. *Burnett* v. *Abbott*, 14 N. J. 291, 294-295 (1954). An administrative determination will ordinarily not be disturbed in "the absence of an affirmative showing of fraud, bad faith or manifest abuse." *Bergen County* v. *S. Goldberg & Co., Inc.*, 76 N. J. Super. 524, 529 (App. Div. 1962), reversed on other grounds, affirmed as to this point of law, *sub nom.; Bergen County* v. *Hackensack*, 39 N. J. 377, 381 (1963); *N. J. Highway Authority* v. *Currie*, 35 N. J. Super. 525, 532 (App.

Div. 1955); *Tennessee Gas Transmission Co.* v. *Hirschfield*, 38 N. J. Super. 132, 138 (App. Div. 1955) and 39 N. J. Super. 286, 288 (App. Div. 1956); *City of Trenton* v. *Lenzner*, 16 N. J. 465, 473 (1954), *certiorari denied* 348 U. S. 972, 75 S. Ct. 534, 99 L. Ed. 757 (1955).

The condemnees did not charge the Commissioner with "fraud or bad faith" in the proceedings before the Law Division. That issue is raised for the first time in their brief on appeal, and without an appropriate notation thereof as required by R.R. 1:7-1(c). Although not required to consider that issue, we conclude from our study of the record that there is no basis to support any such charge.

On the merits of the present controversy we are satisfied that the proofs do not establish an abuse of discretion but, to the contrary, they support the conclusion that the Commissioner acted in the best interests of the public and within the statutory authority vested in him.

Judgment affirmed.

APPENDIX C

Oral Opinion and Findings of the Trial Court

The Court: This matter arises by reason of a complaint having been filed by the State Highway Commissioner seeking to take property belonging to Thomas F. Buck and Mary F. Buck for the purposes of Highway road No. 287. The property is on the southwesterly corner of Mr. Kemble Avenue and Anthony Wayne Road in Harding Township and the map attached to the complaint describes the property in two parcels, 30A and 30B. The matter first came before the Court on a demand for payment of a portion of the money deposited pursuant to R.S. 27:7-22 as amended by Chapter 79 of the Laws of 1965 and the Court made an order on that occasion for a portion of the deposit to be paid to the property owner and it appeared at that time and as part of that hearing that the property owner was questioning the necessity of the State's taking the property, first under the general power to take and, secondly, by reason of R.S. 27:7A-4.1, which became one of the keys to this case.

The Court therefore, consistent with the case of *Bergen County* v. *Hackensack*, 39 N. J. 377 1963, proceeded in a summary manner by granting a hearing on this preliminary question as to whether or not the State had exceeded its authority under R.S. 20:1-1 et seq. and also, as I stated, by reason of 27:7A-4.1, the controlling case being *State* v. *Davis*, 87 N. J. Super. 377, Appellate Division 1965.

The law, I think, of the case is quite clear, namely, that this general right of the State to take, inclusive of the right of the State to take under 27:7A-4.1, is left in the discretion of the legislative agent, namely, the highway commissioner, and by reason of a long line of cases starting with *Burnett* v. *Abbott*, 14 N. J. 291, 1954, at pages

294, 295, the court said the cases and authorities are in agreement that in condemnation proceedings the quantity of land to be taken, its location and the time of taking, are within the discretion of the body endowed by the legislature with the right of eminent domain, citing cases. Where a statute providing for a highway system designates particular routes without selecting the specific highways, the department vested with the authority to make final decisions in carrying out the work has authority to select the particular highways within reasonable limits on the highway route designated by the statute, citing several cases.

The amount and extent of the taking is left to the discretion of the legislative agent and it will not be interfered with by the courts when it is exercising in good faith. The court only interferes where there is a plain case of abuse of discretion in the exercise of the power of eminent domain in excess of the public use upon which it is bottomed in the particular instance. That was followed by *City of Trenton* v. *Lenzner*, 16 N. J. 465, 1954, preceded by *Weehawken Township* v. *Erie Railroad*, 20 N. J. 572, 1956, all of which are to the effect that there must be a clear showing of abuse of discretion, and I conclude that even this special statute proceeds on the same theory, namely, that it's the duty of the person contesting to show an abuse of discretion.

Now, when the case first came before me, that is, on the first hearing, we had some difficulty because of the right-of-way line and the testimony will show that I asked the State Highway engineers to get us some other maps, which they did at the second hearing, namely, S-3 and S-4. These maps show clearly that what the State proposes to do is to take all of the property and that whether they take the 60 feet just contiguous to the right-of-way and leave a gore

at the end of the property or whether they put the 60 feet at the southerly extension of the property and leave the gore next to the right-of-way, that we are here dealing with property that in total is approximately 1.02 acres, that the gore is .2 to .25 and that the other yellow strip is .88 acres.

It is also agreed that to the south of this property there is a piece known as the Sheldrick piece, which by reason of the State Highway's taking will leave a landlocked piece of land 5.308 acres and would have no access. I have heard the testimony of at least one State Highway engineer, of two experts, one for the property owner, Mr. Bauche and Mr. Steinberg for the State, and an engineer by the name of Scherzer, who testified as to the cost of building the road. Counsel for the property owner—and the Court had some little difficulty about the meaning of the statute—but I think ultimately counsel made it clear and the Court accepts his argument, that not only does the interest of the public section of 27:7A-4.1 have application to the clause that the cost of acquisition to the State will be practically equivalent to the total value of the whole parcel of land, as well as to the other section about the landlocking, but I come to the conclusion in this case that based upon the testimony of Mr. Steinberg, namely, that the cost of acquisition of 30A and 30B will be $46,000 and that the acquisition of 30A alone would be $45,000, that the State has met the two tests set forth in the statute.

Now, of course, without in any way determining the ultimate price to be paid for this property, I conclude that Steinberg much more nearly hits the mark as to the comparative values of the taking totally than does Mr. Bauche, who says that the whole property is worth $76,298 and some cents and that in his opinion this small piece is worth $9500, $6000 for the land, $3500 for a seed house shown in

P-1 in evidence, but I conclude, No. 1, that from the physical evidence it is difficult, almost incredible, to believe that the building has that value but, secondly, that Mr. Bauche proceeds upon an erroneous view of the ordinance because Section 3 as amended makes it clear that we are here dealing with residence zone, that the purpose of this ordinance is to provide certain things that may be done in a residence zone, and even Section 8—farming, truck gardening or nursery—which has ben amended so that farms, truck gardens and nurseries and the sale of products raised thereon make it perfectly clear that it is to be done in an otherwise conforming use in this zone, and I find that the whole argument about any accessory use, the use proposed by Mr. Bauche, namely, that this could be used for the storage of horses or for the storage of carriages, is without foundation under the ordinance. It is clear to the Court that we are here dealing with a piece of property having a frontage on Anthony Wayne Road of only 80 feet and a depth of some 575 on one side and 578 on the other side, in which it would be most difficult in the Court's view to obtain any variance, and I find incredible the ascribing of a $6000 value to a piece of property so located and so situated.

Proceeding on the other theory, which I find unnecessary to a decision, namely, that we are balancing here the getting of access to a landlocked piece, namely, the Sheldrick piece, proceeding on the Steinberg theory, the property would be worth $15,000, at approximately $3000 an acre, according to Scherzer's testimony it would cost $18,000 to build an accessory road, so the State would be out-of-pocket on that theory; but if you proceed on Mr. Bauche's theory the property, the five acres, would have a value of over $30,000, the road would cost $18,000, and the most you

would be required to say would be a $9500 value for this 1.2 acres plus the seed house, so the State even on that theory would come out slightly ahead although not very much.

It is my view that the Court is not called upon to decide in these instances whether or not if the Court had the power it would proceed as did the State. I come to the view that what the legislature meant to do was to give and put this discretion in the State Highway Commissioner and that absent showing this abuse of power, just as in our whole line of zoning cases, that absent this abuse of power the Court should not intervene but should let the matter reside in the person to whom the legislature has given it, namely, the State Highway Commissioner. I will determine that the State is within its rights under the statutes in taking the entire piece. You may present a judgment.